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No. 10-591

In The
Supreme Court of the United States

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Petitioner,

v.

RBC CAPITAL MARKETS CORPORATION,
LEONARD SCHNEIDER, LESLIE SCHNEIDER,
SCOTT SCHNEIDER AND SUSAN SCHNEIDER,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 15.6 of this Court, Petitioner respectfully submits its Reply Brief, addressed to Respondents Leonard Schneider, Leslie Schneider, Scott Schneider and Susan Schneider (collectively, "Respondents") Brief in Opposition to the Petition for Certiorari, as follows:

REASONS FOR GRANTING THE WRIT

I. Petitioner's Arguments Have Already Been Rejected on Numerous Occasions by the Second Circuit, Making It Futile to Raise These Arguments Again Within the Circuit, But Providing This Court With An Extensive Record of the Lower Court's Reasoning for Review.

In the proceeding below, in overturning the lower court's decision to deny Respondents' Rule 50(b) motion, the Second Circuit effectively overturned a jury verdict on appeal. The trial judge and the jury verdict would likely have been upheld, had the Court of Appeals been required to give deference to the trial judge's Rule 50(b) decision.

This fact, however, did not become apparent until the Court of Appeals' decision to overturn the verdict was issued, along with the accompanying reasoning. The Second Circuit's opinion, because it weighed contradictory evidence differently from the trial court, has perched the outcome of the case below precisely on the hinge between *de novo* review and review for abuse of discretion. As a result, the Second

Circuit's opinion presents for meaningful decision by this Court, first, a longstanding circuit split under the *Erie* doctrine that this Court has itself recognized as "important" and meriting its attention,[1] and second, the question of what precisely the Founding Fathers meant by the phrase "rules of the common law," which they inserted into the Reexamination Clause of the Seventh Amendment.[2]

Respondents seek to avoid review of these questions, by suggesting that the Court will be deprived of the benefit of the lower court's reasoning, because the appropriateness of the *de novo* standard of review was not briefed and argued below. Respondents point out that "[i]nsisting that issues be briefed in and considered by the court of appeals ensures that this Court has the benefit of the lower court's thinking, allows issues of importance to ferment and percolate through the judicial system, and often leads to better-considered decisions."[3]

However, in the present case, none of these interests would be served by denying review. It is rare and unusual for a circuit split to "ferment and percolate" for as long as the circuit split under *Erie* and Rule 50(b). Petitioner submits for review not only the Court of Appeals' immediate decision below, whose specific findings are of importance solely

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[1] *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 445 (1959).

[2] U.S. CONST. amend. VII.

[3] Respondents' Brief in Opp. at 10.

because they cause the outcome of the case to hinge on the applicable standard of review, but also the myriad decisions emanating from the longstanding circuit split under *Erie* that has "fermented and percolated through the judicial system" for more than half a century. This Court will be assured the benefit of the lower court's reasoning through review of a long stream of Second Circuit decisions, which have repeatedly addressed whether federal or state law should govern review of a Rule 50(b) motion.[4]

Indeed, the Second Circuit had already considered on numerous occasions – and consistently rejected – the very arguments Petitioner presents to this Court.[5] Thus, raising the issue in the Court of Appeals would have been futile, and would have

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[4] Indeed, it is quite possible that this issue – whether federal or state law should govern Rule 50(b) motions – has not been addressed more extensively by any other Court of Appeals. The Second Circuit applied state law to Rule 50(b) motions in diversity decisions as late as 1975. *See, e.g., Mehra v. Bentz*, 529 F.2d 1137, 1139 (2d Cir. 1975) ("Since this is a question of sufficiency of evidence, New York law governs the question."). However, in the 1970s, a contrary line of precedent had begun to develop. *See, e.g., Simblest v. Maynard*, 427 F.2d 1, 4-5 (2d Cir. 1970) (upholding a jury verdict because there was sufficient evidence under both the federal and state standard). For roughly the past twenty years, the Second Circuit has consistently held that federal procedural law controls Rule 50(b) motions. *See, e.g., Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970 (2d Cir. 1987).

[5] *See supra* n. 4.

required Petitioner to resurrect a long-rejected argument before the Court of Appeals, prior even to its relevance in the proceeding below being established (and presumably for the sole purpose of later raising the issue again in this Court). If this Court's flexible practice, which generally favors review of questions that have been fully briefed and argued below, has a purpose, then surely it is not for litigants to preemptively raise long-rejected theories within the Courts of Appeals for the sole purpose of gaining a foothold in this Court.

This case presents a unique opportunity to address the appropriate standard of review under Rule 50(b), given the wide gulf between the Second Circuit's opinion below and that of the District Court – a gulf which suggests that greater appellate deference to the trial court would yield a different result in this proceeding.

Moreover, addressing the Questions Presented in the Petition would not depart from this Court's existing practice. "It is well settled . . . that the Court's practice of declining to address issues left unresolved in earlier proceedings is not an inflexible rule."[6] The preference for full briefing and argument below "is not inflexible, particularly in cases coming, as this one does, from the federal courts."[7] This is

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[6] *Boumediene v. Bush*, 553 U.S. 723, 772 (2008).

[7] *Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) (reviewing newly-presented questions not briefed or argued below).

particularly the case where the "District Court made findings on all factual issues necessary to resolve [the] question[.]"[8] Moreover, review is warranted where the issue involved is "an important, recurring issue" and "the interests of judicial administration will be served by addressing the issue on its merits."[9]

The issue of whether federal or state law should govern the review of a Rule 50(b) motion, when a federal court is sitting in diversity, has deeply divided the U.S. Courts of Appeals, involves an important and recurring issue in the federal courts. The sound resolution of this question on its merits will benefit from the reasoning of all thirteen Courts of Appeals below, each of which has addressed the issue.

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[8] *Id.* ("Under these circumstances, we see no reason to refrain from addressing the question.").

[9] *Carlson v. Green*, 446 U.S. 14, 17 (1980) (reviewing a question which "was presented in the petition for certiorari, but not in either the District Court or the Court of Appeals.").

II. Respondents' Assertion That A State's Appellate Standard of Review Is Not Part of the "Package" of Substantive State Law That Should Be Applied By Federal Courts Raises A Complex Dispute Under *Erie*, And Should Be Briefed in Full Before This Court.

Respondents next attempt to discourage this Court from granting certiorari by arguing that a state's decision to accord appellate deference to a trial court's decision upholding a jury verdict is not part of the "package" of forum state substantive law, for the purpose of appellate review of jury verdicts.[10] Respondents argue that, because a state's substantive law on review of jury verdicts and its standard of appellate deference raise wholly separate issues, the proceeding below does not implicate the circuit split under *Erie*.[11]

This argument raises a legal dispute with the Petitioner, who presents a contrary argument: that the forum state's decision to allow review of a trial court's decision upholding a verdict only for abuse of discretion is itself part of the "package" of substantive state law governing review of jury verdicts, which must be applied by federal courts

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[10] Respondents' Brief in Opp. at 16 (arguing that the standard for *appellate* review of Rule 50(b) decisions is a distinct issue – wholly separate from a state's standard for review of jury verdicts).

[11] *Id.*

sitting in diversity.[12]

As Respondents point out in their petition, a state's practice concerning review of jury verdicts may differ from federal practice in one of *two* distinct ways – either because the standard for sufficiency of the evidence is different, or because the standard for appellate review of a trial court's decision to uphold a verdict is different. In New York, the forum state in the proceeding below, the standard for sufficiency of the evidence is materially the same as the federal standard.[13] But, as Respondents concede, the standard for appellate review of that same determination is markedly different from the federal standard.[14]

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[12] *See* Petition, at 14-15 ("[O]btaining *de novo* review of a trial court's determination – a second chance to question the jury's judgment – provides a powerful incentive for forum shopping. The rationale behind the *Erie* doctrine, therefore, counsels that federal judges should apply the same standard under Rule 50(b) as their forum-state colleagues, including, where required by the forum state, lowering the evidentiary bar when reviewing a verdict that was upheld by the trial court.").

[13] *See* Respondents' Brief in Opp. at 13-15.

[14] *See* Petition, at 8-9 & nn. 3, 4 (outlining how federal law allows *de novo* review of a trial court's decision to uphold a verdict, whereas New York law gives deference to the trial court's decision and only allows appellate review for abuse of discretion).

If the purpose of *Erie* is to ensure that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of litigation," then clearly, whether the forum state's appellate courts give deference to the trial court's determination is a *substantive* question under *Erie*, and one in which federal practice should conform to the forum state.[15] This is illustrated by the proceeding below, in which the outcome would have been different if the Second Circuit applied the same standard of review as New York's appellate courts.

In other words, an appellate court's deference to a lower court's decision upholding a verdict is, for practical purposes, indistinguishable from the appellate court's deference to the verdict itself. If the trial court has upheld the verdict, then deference to the trial court means deference to the verdict, and a lesser deference to the trial court necessarily implicates a lesser deference to the verdict itself. If this is the case, then under *Erie,* the forum state's practice in reviewing trial court decisions upholding jury verdicts is part of the "package" of forum state law that a federal court sitting in diversity must apply.

If, however, the two standards of review truly are distinguishable in practice – and a meaningful

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[15] *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 428 (1996) (*quoting Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945)).

distinction can be drawn between giving deference to a trial court's decision upholding a verdict on the one hand, and giving deference to the verdict itself, on the other – then quite clearly, the appellate standard of review is a procedural question to be governed by federal procedural law, while the separate sufficiency-of-the-evidence standard is a substantive question to be governed by state law.

The dispute between Petitioner and Respondents concerning the scope of the circuit split is, therefore, indistinguishable from a substantive dispute between Petitioner and Respondents on the merits, under *Erie*. Both sides should be given the opportunity to brief and argue this complex issue in full before this Court.

As the Second Circuit observed in *Evans v. S. J. Groves & Sons Co.*:

> The present case well illustrates the conflicting pulls on the issue: The state law can be regarded on the one hand as a rule relating to the distribution of power between court and jury and thus as not binding on a federal court under the Seventh Amendment even in a diversity case . . . or, on the other, as a substantive rule[.][16]

Contrary to Respondents' suggestion, the circuit split on this question is an enduring one, as

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[16] 315 F.2d 335, 342 n.2 (2d Cir. 1963).

recognized repeatedly by the federal courts.[17] This Court has itself recognized that the issue is important enough to warrant certiorari – while deferring review to a case, such as the instant proceeding, in which the question is meaningfully presented, and can be briefed and argued in full before this Court.[18]

Finally, despite Respondents' assertion to the contrary, there is a meaningful distinction between federal and state law governing review of jury verdicts – *if* the standard of appellate review is part of the "package" of state law that a federal court sitting in diversity must apply.

In the proceeding below, for instance, New York's practice of deferring to the trial court should have governed. Accordingly, the outcome of the entire case should have been different. In light of the proceedings below, it can hardly be argued that the distinction between *de novo* and abuse of discretion

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[17] *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 445 (1959); *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1455 (1985) ("There is conflict among the circuits on the question of whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict in a case where federal jurisdiction is rested on diversity of citizenship.") (citations omitted). *See also* Petition, at 12-13 & nn. 10, 11 (showing the Sixth, Seventh and Eighth Circuits applying state law in recent decisions under Rule 50(b), and the remaining Courts of Appeals applying federal procedural law).

[18] *Dick*, 359 U.S. at 445.

review is not a "substantive question" which may control the outcome of numerous federal diversity proceedings. This Court should take the opportunity to resolve this "important" question.

III. Appellate Review of Jury Verdicts Undoubtedly Implicates the Reexamination Clause.

Moreover, the standard of appellate review of Rule 50(b) decisions clearly implicates the Reexamination Clause. Indeed, the Seventh Amendment was enacted in large part to limit *appellate review* of jury verdicts.[19]

Respondents' claim to the contrary, based on the theory that review of jury verdicts is a "legal question" and that, therefore, *de novo* review is presumptively appropriate, likewise raises a substantive dispute on the merits. Respondents' argument that *de novo* review does not offend the

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[19] *See, e.g., United States v. Wonson,* No. 16,750, 1 Gall. 5, 28 F. Cas. 745, 750 (U.S. Cir. Ct. Mass. 1812) (Story, J.) (the "scope and object" of the Seventh Amendment addressed "apprehensions entertained of new trials by the appellate courts"); *see also* Tribe, Laurence, *Am. Constitutional Law*, § 3-32, *The Seventh Amendment Right to Trial by Jury as a Limit on Federal Judicial Power*, at 624 (stating that the history of the Reexamination Clause "reveals that it was adopted principally to protect jury verdicts from after-the-fact judicial interference, especially by appellate courts").

Seventh Amendment, and Petitioner's contrary position, should be briefed and argued in full before this Court. However, the Seventh Amendment is clearly implicated by this question, and the authority Respondents cite is not to the contrary.[20]

Moreover, the inclusion of the phrase "according to the rules of the common law" in the Reexamination Clause suggests that the drafters of the Seventh Amendment may have intended for appellate review of jury verdicts to continue in the same form that was familiar to them, according to the common law as it existed at the time the Amendment was drafted. It is for this reason that Petitioner cites to Justice Scalia's dissent in *Gasperini v. Ctr. for Humanities, Inc.*, in which Justice Thomas joined. The use of this particular phrase may provide persuasive grounds for

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[20] *See* Respondents' Brief in Opp. at 21-22. Respondents quote *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967), for the proposition that "there is no constitutional bar to an appellate court granting judgment n.o.v." This Court's holding in *Neely* was, therefore, that the Seventh Amendment did not "bar" appellate review of jury verdicts. This does not address the question of whether *de novo* review of a trial judge's decision to uphold the verdict is appropriate. *See also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 457 (1996) (Scalia, J., dissenting) (disagreeing with the holding in *Neely*: "our prior cases were correct that, at common law, 'reexamination' of the facts found by a jury could be undertaken only by the trial court, and that appellate review was restricted to writ of error which could challenge the judgment only upon matters of law.").

an originalist interpretation of the Reexamination Clause, even without the necessity of embracing an originalist interpretation of the Constitution as a whole.

Respondents' remaining arguments against certiorari are without merit. Respondents attempt to dispute the Second Circuit and the New York Court of Appeals' recognition that the dispute below is significant to the nation's securities markets. The Second Circuit explained the specific reasons the dispute below is economically significant: if oral trades such as the one at issue below *might* not be enforceable, then "[i]mposing such uncertainty upon the financial community risks deterring the trading of promissory notes in financial markets, thereby restricting the free flow of capital."[21] In other words, what matters for the purposes of free flow of capital is not only the enforceability of oral trades per se, but the *uncertainty* that is created if the standard for enforceability is unclear.

The Second Circuit's decision to overturn a jury verdict – essentially, by elevating various factors which may cast doubt over an agent's authority to bind their principal – quite clearly implicates the enforceability of such oral agreements, and for obvious reasons, generates uncertainty in oral trades. The opposite result – simply enforcing the agreement because it was made according to industry practice –

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[21] *Highland Capital Mgmt., L.P. v. Schneider*, 460 F.3d 308, 320 (2d Cir. 2006) (App. 46-47).

would reduce uncertainty. As the Second Circuit and New York Court of Appeals have already recognized, Petitioner's crusade to enforce its trade is, therefore, significant not only to Petitioner and Respondents, but to the national security markets.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court grant certiorari on the questions presented.

Respectfully submitted,

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